UNITED STATES SUPREME COURT.

Elias S. A. De Lima and others, AGAINST George R. Bidwell.	No. 456.
Samuel E. Downes AGAINST George R. Bidwell.	No. 507.

Brief in Reply for Plaintiffs in Error.

By leave of the Court the plaintiffs in error submit the following brief in reply to the positions taken by the Government and to suggestions made in the course of the argument.

Preliminary.

Jurisdiction:

The only point on this subject not fully anticipated in the briefs already filed is in the position taken by the Solicitor General in reply to a suggestion from Mr. Justice Brewer.

The Solicitor General contended that because the present action is brought at common law against the collector on the ground that the goods upon which he exacted the payment of duty were not imported merchandise, and did not fall within the purview of the Tariff Act, it was not therefore, "a suit at law or in equity arising under the revenue laws," as to which Section 629, Subdivision *Fourth*, of the Rev. Stat., gives

jurisdiction to the Circuit Court without reference to the amount involved.

The jurisdiction of the Circuit Court is not confined to the adjudication of *rights* arising under the Revenue Law, but extends to suits, *i. e.*, controversies arising under such law.

The "controversy" in the present case certainly arose out of the Revenue Law; the collector claimed and insisted that the merchandise from Porto Rico was subject to such Revenue Law and he exacted the payment of duty in accordance with what he conceived to be the provisions of such law; the plaintiff disputed this contention and under protest forcibly submitted to the exaction.

The Solicitor General suggested that plaintiff in error might have followed the example of the claimant in *Re* Fassett, 142 U. S., who resorted to a libel in admiralty to get possession of his yacht, but unfortunately the plaintiff's merchandise in the present case was not maritime, and Sec. 934, U. S. Rev. Stat., specifically prescribes that property detained by any officer under the Revenue Laws shall be irrepleviable.

Answers to Inquiries:

WHAT POWER CONGRESS WIELDS WITHIN THE TERRITORY AS A LOCAL GOVERNMENT.

WHENCE THESE POWERS ARE DERIVED.

Several of the Honorable Justices inquired into the position which plaintiff in error would insist on in reference to these questions:

I. Is the power of Congress to lay taxes within a territory for the benefit of such territory subject to the limitation imposed by Art. I ,Sec. VIII, of the Constitution, that "all duties, imposts and excises shall be uniform throughout the United States"?

II. Whence does Congress derive the power to lay taxes within a territory for the benefit of that territory?

III. Are those powers of taxation unlimited?

We believe the following answers to these questions are in accord with judicial interpretations:

I. The power of local taxation within the boundaries of a territory for the benefit of such territory is not limited by Art. I, Sec. VIII of the Constitution for this reason:

The power given by that section is the power to lay certain taxes "to pay the debts and provide for the common defense and general welfare of the United States;" it is only for that purpose that Congress as a National Legislature was thus empowered to lay taxes, and the limitation is that taxes laid for that purpose and under that power "shall be uniform throughout the United States."

II. Whence does Congress derive the power to lay taxes within a territory, etc.

Apart from the power granted to Congress to raise revenue for the common defense and welfare, it is also given the power "to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States;" it is given discretion as to the admission of new States into the Union (Art. IV, Sec. III, Const.).

The Government has power to make war, to enter into treaties. These faculties involve the power to acquire territory. The power to acquire territory has been repeatedly held to imply of necessity the power to govern it.

> "All territory within the jurisdiction of the "United States not included in any State must "necessarily be governed by or under the authority "of Congress * * * there have been some "differences of opinion as to the particular clause "of the Constitution from which the power is "derived, but that it exists has always been con-"ceded" Nat. Bank *v.* County of Yankton, 101 U. S., 133, 132).

The power of taxation is the fundamental right of all government. Without it, no real government is possible. Without it, no laws can be enforced, no provision made for the safety and protection of the inhabitants, no crime repressed, no justice administered.

If Congress can govern territory at all, it can raise revenue in such territory, for this is the first and indispensable requisite to all governmental administration.

III. Are these powers of taxation unlimited?

We must accept as settled jurisprudence that Congress possesses in the Territory whatever powers a State government possesses within the limits of a State.

What then are the powers of a State and what are its limitations?

(*a*) The powers of a State are of a certainty confined to persons and property within its own border.

As a local legislature levying taxes for the benefit of a local circumscription, known as a Territory, Congress must assuredly be limited in the exercise of this power to the persons and property within such Territory.

The power of taxation which Congress exercises for the benefit of each Territory is not the power of taxation lodged in Congress as representing the entire Federation, for *this* taxing power is to be found only in Art. I. Sec. VIII, of the Constitution, and can only be exercised for the common benefit of the entire nation, and with the exception of *direct taxes* must be exercised uniformly throughout the nation.

The taxation within the Territory, then, is the exercise of the express or implied power to govern the Territory out of which it has the privilege to admit new States into the Union.

As the jurisdiction and sovereignty of a State Legislature is confined to the limits of a State, so Congress, as the Legislature of the District of Columbia, is confined in the exercise of its powers to that District, and cannot lay a tax on the merchants of New York for the benefit of the District. (Gibbons *v.* Dist. of Col., 116 U. S., at p. 407.)

(*b*) By what else than the boundaries of its own commonwealth is a State restricted in its powers of taxation?

By the terms of its own Constitution.

Is Congress governed and restrained by no constitution when it is administering to the local needs of a Territory?

Is it, as Mr. Justice White inquired, free to tax without equality, without justice between man and man? May it, in other words, deprive any citizen of the Territory of his property without due process of law? (Art. V, U. S. Const.).

To this we must answer that it is bound and restrained by the provisions of the Constitution in virtue of which it governs the Territory.

This is the Constitution of the United States.

This Court said in the Yankton case, *supra*, that Congress "may do for the Territories what the people under the Constitution of the United States may do for the States."

It would seem clear from this language that Congress in the Territories is bound by the Constitution.

To put it in another way. The Legislature of a State is an agent of its people empowered to do all that its principal has authorized it by its Constitution. Congress in each Territory is the agent of the people for the government of that Territory, endowed with all the authority and with no other authority than that transmitted under the terms of the Constitution.

It is true that in the Yankton case, 101 U. S., 133, there is a remark in the opinion of Chief Justice Waite to the effect that "the organic law of a Territory takes the place of a Constitution, as the fundamental law of the local government." A cursory reading of this phrase might lead to the suggestion that anything could be done and rightfully done in a Territory which the organic law of its organization did not prohibit.

But the Court is careful to prevent any such inference from being drawn by explaining that Congress which passes the "organic law" in question has in its governmental authority over the Territory no powers

that have been expressly or by implication reserved in the Constitution, and in the case of Springville v. Thomas, 166 U. S., at page 708, the Court, through Chief Justice Fuller, lays down the rule that in framing an organic act for a Territory, Congress could not impart the power to change a Constitutional rule.

This process of reasoning brings us back to the safe anchorage of the Constitution of the United States which will keep Congress from drifting into the exercise of any prohibited powers in the Territories.

Unless, therefore, the Constitution of the United States, either expressly or by implication, limits the power of taxation by Congress when acting as the local legislature for a Territory, we may admit that Congress is not, within such circumscription, subjected to any limitation in the exercise of the taxing power.

Such absence of limitation, however, could have no bearing upon the plain limitations placed on Congress by Art. I, Sect. VIII, of the Constitution, when exercising the power of taxation conferred upon it by the same section, to wit: That the district imposts must be laid and collected "to pay the debts and provide for the *common* defense and welfare of the United States." (Cooley's Ed. of Story on the Courts, §§908 and 926), not "to be placed at the disposal of the President, to be used for the government and benefit of Porto Rico" (Foraker Act, cited by Solicitor General, p. 71 of brief); and secondly, that such imposts and duties should be uniform throughout the United States, and not imposed upon the products of Porto Rico, while like products of Louisiana are not subjected to them.

We believe, however, that unjust and unequal taxation and discrimination in the distribution of the burden of taxation among the citizens of the Territory would be a violation of that prohibition in the Constitution intended for the protection of all who came under the rule of any of its agencies of government, to wit, the provisions of Art. V of the Amendments, that no one

shall be deprived of property without due process of law.

These words it has been said, the "good sense of mankind has come to understand," as intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice." (Mr. Justice Johnson in *Bank of Columbia* v. *Okely*, 4 Wheat., 235).

"Transferring money from the owners of it to those who have no title to it, though it be done under the name or form of a tax, is unconstitutional for all the reasons which forbid the legislature to usurp any other power not granted to them." (Black, J., in *Sharpless* v. *The Mayor*, 21 Penn. St., 162.)

"The meaning is," said Mr. Webster in the Dartmouth College case, "that every citizen shall hold his "life, liberty, property and immunities under the pro- "tection of the *general rules which govern society.* "Everything which may pass under the form of an en- "actment is not therefore to be considered the law of "the land."

Judge Cooley (Constitutional Limitations, p. 354) commends this definition and adds these words from Judge Bronson (4 Hill, N. Y., 140): "These words, "the law of the land, as used in the Constitution, do "not mean a statute passed for the purpose of working "the wrong. That construction would render the re- "striction absolutely nugatory and turn this part of "the Constitution into mere nonsense."

"In providing for equality and uniformity, they" [*the State Constitutions, says Judge Cooley, Op. cit., p. 495*] *"have done little more than to state in concise "language a principle of Constitutional law which, "whether declared or not, would inhere in the power to "tax"..And the same writer lays down the rule that it is "essential that the legislature keep within its "proper sphere of action, and not impose burdens under "the name of taxation which are not taxes in fact"* (*p. 513*).

We therefore repeat, although such contention is unnecessary to establish our case, that we do not believe Congress has the power of fantastic and unequal and partial taxation even among the inhabitants of the Territories which the Constitution commits to its administration.

The Positions of the Government.

The learned Attorney General, as well as the learned Solicitor, concede that the Government of the United States has only been vested with certain particular powers which are in some respects limited and confined in scope and operation.

The Solicitor at page 57 of his brief asks: "Are there then no limitations on this plenary power of Congress to govern the Territories?" and he answers: "I believe there are."

The Attorney General at page 11 of his brief tells us that "the real and practical question is whether there is any limitation preventing the particular thing here complained of," and finally the Solicitor General concedes that "wherever a particular power is exercised the limitation placed upon it by the Constitution must be observed, and that neither the executive nor legislative nor judicial branches of the Federal Government can act except through a power conferred by the Constitution" (page 57).

The power of taxation, the power to lay duties and imposts, is contained in Art. I, Sec. VIII of the Constitution, and the limitation is at once placed upon it—coupled with it inseparably—that such duties and imposts shall be uniform throughout the United States, and in the language of the Solicitor General, "wherever a particular power is exercised, the limitations placed upon it by the Constitution must be observed."

Having conceded this much, the Government endeavors to defend its action and has undertaken the burden of showing that the limitation above referred to was meant to *exclude* every part of the nation, except sovereign States.

We will examine briefly the positions relied upon by the Government to establish such intent to exclude.

First.—Certain judicial precedents have been invoked.

The Territorial Court Cases have been cited but these are all interpretations of the Judiciary Article in the Constitution which provides a particular system for its Federal judiciary, the limited scope of which has been made apparent in all those decisions, which have been fully commented on in our original brief.

The Indian Cases have been invoked, but they are clearly shown to rest upon the peculiar tribal relation of the Indian which divests him of certain rights of citizenship and puts the Territory occupied by him in a situation inapplicable to any other Territory.

What may be classed as The Utah Cases have been invoked because of certain expressions which the Government relies upon as showing that Constitutional immunities were secured to the inhabitants of Utah, not by virtue of the Constitution, but by grace of an Act of Congress re-enacting Constitutional provisions.

That this claim cannot be sustained we believe has been demonstrated in the main brief already filed, but an allusion may properly be made to the latest case, Springville *v.* Thomas, 166 U. S., 708, in which the Court says:

> "In our opinion the VIIth Amendment secured
> "unanimity in finding a verdict as an essential
> "feature of trial by jury in common law cases, and
> "the Act of Congress could not impart the power
> "to change the Constitutional rule."

If it was only by the grace of Congress that the Territory enjoyed the immunities, it would follow that Congress could withdraw what Congress could impart. This power is denied by Springville *v.* Thomas and the existence of the privilege or immunity ascribed to its proper origin, the Constitution of the United States.

In this connection much stress has been laid on the fact that in the various organic acts of the Territory Congress had chosen to re-enumerate a number of Con-

stitutional provisions and declare its intention that they shall be applicable to various Territories. This, it is argued, would not have been done if the Constitutional provisions were applicable of themselves.

It is a familiar and has grown to be a common occurrence, out of abundant caution to repeat provisions whose repetition was not vital. The legislation of Congress to provide machinery for carrying out provisions of the Constitution is full of such instances. The most apposite and notable one is cited by the learned Attorney General at page 101 of his brief. In the United States Statute of June 22nd, 1874, provision was made as follows: "The Constitution and all laws of the United States which are not locally inapplicable shall have the same force and effect within all the organized Territories," and yet as the learned Attorney General has stated, at pages 100 and 101 of his brief, that same Constitution had already by statute been extended to every Territory since 1850.

SECOND.—It is insisted that the limitation was meant to exclude everything except organized States, because the situation at the time of the adoption of the Constitution shows the existence of intense jealousies between the States and their respective endeavors to protect themselves each against the other.

To establish an intent to exclude everything outside of the States from the reasonable protection which uniformity of taxation provided, requires the assumption that the States were unwilling to extend that protection to their own Territory, the settlement of which was just begun by parts of their own people, and yet it was a protection which they jealously insisted upon for themselves and which they considered essential to the maintenance of their own freedom.

This suggestion is repugnant and will certainly not be adopted from inference.

The only other argument to be drawn from the situation at the time in favor of the exclusion of the Territories from the uniformity demanded by the States is

that no such Territories were held in view, and that the future was not foreseen.

But this contention would make it clear that the *exclusion* was not intended, as the case was not in mind. Moreover, if we must look to the protection of the States and to that purpose as the object of the Uniformity Clause, let us see what might result by the exclusion of the Territories from its operation.

During the argument of the Goetze case, Mr. Justice White inquired of the Attorney General whether Congress could exempt Territories from burdens upon States and give them privileges denied to the States. To this the Attorney General, contending for the exclusion of Territories from the operation of the Uniformity Clause, could only answer "Yes." This is possibly one of the results from which the States sought protection in the adoption of a Uniformity Clause. If Congress may exempt Territories from burdens put upon States and may give to Territories privileges denied to States, what protection have the commerce and the industries of States against advantages that may be so given to the Territories?

If at the time of the controversies ventilated in the case of Cross *v.* Harrison, San Francisco had been declared a free port, if to-day the woolen industries of the various States that have so often agitated the councils of the nation found the tariff protection accorded to them wiped out by allowing the introduction of woolens into Sitka free of duty, would the States conceive that they had secured the protection they sought for in the Uniformity Clause?

In his effort to confine the term "United States" to the organized sovereign States, the learned Solicitor (p. 89, Brief) cites the Acts of 1807 and 1818 prohibiting the importation of negroes "into the United States or Territories thereof," which he argues would have been unnecessary if the word "States" in the Constitutional prohibition to the same effect had been intended to include the Territories.

A reference to Art. I, Section IX, of the Constitution will show why the addition of "Territories" was

needed. The section in question prescribes that no prohibition against the importation "of such persons as *any of the States now existing* shall think proper to admit" shall be made prior to 1808.

Here is a phraseology that might readily have been adopted in the uniformity clause had the intentions of the framers coincided with the present contentions of the Government.

THIRD.—The Government has urged that not to exclude territory outside of the States from the operation of the Uniformity Clause would involve such an "incorporation of the territory into the Union," such a recognition of the Territory as "an integral part of the United States," that citizenship of the inhabitants of the acquired territory would follow. They would have the political franchise and become factors in the government of the nation.

They argue that such a result demonstrates the intent to exclude all Territory from the operation of this and other constitutional limitations, and finally they appeal to the difference between prior treaties of cession and the Treaty of Paris to show that only in this latter Treaty have the civil rights and political status of the native inhabitants been left to the disposition of Congress.

We respectfully submit that these are fallacies: They have been treated at length in the original brief and but one word will be said here.

Incorporation of Territory as a part of the United States is not equivalent to its incorporation as a member of the Union of States,—as a member of the governing body made up of States.

Not citizenship—in the sense of persons entitled to the exercise of political franchises follows acquisition of Territory. What follows is allegiance on the one hand and correlative protection on the other—*i. e.*, *Nationality.*

This nationality of the conquering power was imposed upon all but Spanish-born inhabitants of the ceded Territory by Art. IX of the Treaty of Paris.

Citizenship—the right to exercise the political franchise—is always in the control of Congress. The Treaties of Louisiana and Florida merely exacted a promise that *this* citizenship would be conferred by the incorporation of the Territory into the Union of States. Even in this promise history shows Congress did not consider time as of the essence and carried it out when it deemed it proper.

No such promise was exacted in the Treaty of Paris. The only difference is that Congress in this case may take its time for the admission of the Territory "to incorporation into the Union of States" without being subjected to such remonstrances as it received from Louisiana.

The Treaty has also aimed to give Congress full power over the civil rights of the native inhabitants of the Territory which it cedes.

There are certain "civil rights" over which Congress undoubtedly has this power; such as the right to serve on a jury, the right to sue in our Courts, the right to practice certain professions, etc., etc., but there are certain other civil rights, personal rights, over which not even the Treaty can give Congress authority, because, as Chief Justice Marshall observed in the Cherokee Tobacco Case (11 Wallace, 620), "it need hardly be said that a Treaty can not change the Constitution or be held valid if it be in violation of that instrument. This results from the nature and fundamental principles of our government."

That Congress so understood the various stages of citizenship and did not suffer from any such fear as we have here indicated is very evident from the Report of the Committee on Pacific Islands and Porto Rico, by Senator Foraker, Feb. 5, 1900. At p. 12 of this Report he cites from Judge Cooley's Notes on Story on the Constitution, §§1932-33-34, to show that "the "word 'citizen' is employed in the law in different "senses and different circumstances. As generally em- "ployed it may be said to be *a person owing allegiance* "*to the government and entitled to protection from*

"*it.*" That among the rights of citizens are many which are enumerated, among them "*to be exempt from "inequality in the burdens of government.*" "Surely, the Committee adds, "the inhabitants of Porto Rico "should have all these rights" (pp. 12 and 13).

With all the examination given to the subject by the Committee and with the provisions of the Constitution before them, it is not surprising that their good faith compelled this recognition of the experimental character of the legislation which is now before this Court for adjudication:

"The Committee recognize that in not extending the "Constitution and making it apply to Porto Rico, *and "especially by the provisions they report in this bill with "respect to tariff duties, they raise important questions "as to the Constitutional power of Congress to enact "such legislation*" (p. 8 of Report, *supra*).

FOURTH.—The learned Attorney General in reply to Mr. Justice White, asserted that Congress could give privileges to Territories which were denied to States. He instanced exemption from "direct taxes." He did not at the moment recall that the Uniformity Clause applies only to "duties, imposts and excises," and not to direct taxes. (Loughborough *v.* Blake.)

The learned Attorney General also instanced then and at pages 104 and 105 of his brief that the Internal Revenue Laws have not been extended to the Territories.

In this the briefs already filed show that the learned Attorney General has fallen into an error. Although under the first Internal Revenue Law only fourteen districts were laid out, corresponding to the various States, power was given to the President to send collectors elsewhere. The formation of collection districts has been held not to be necessary to the collection of Internal Revenue as instanced in the Cherokee Tobacco Case, *supra.*

FIFTH.—Escape from the operation of the Uniform-

ity Clause is also sought by giving to the tax complained of, the label of a "Local Tax."

This view of the subject has been specially treated in a short supplemental brief filed at the time of the argument in the Downes case, No. 507.

SIXTH.—It is claimed that neither under the "Rules and Regulations Clause" nor in the inherent power to govern what is acquired, have any limitations been put upon Congress in the control of the Territories. That this power is "supreme" and "absolute"; that there are no restraints upon it.

In order to soften the shocking effect of such a far-reaching claim it is admitted, to quote the language of the Solicitor General (page 61, brief), that: "Outside the limitations of the Constitution its spirit requires a government to treat all subject to our dominion with justice and equality under the law." This the learned Solicitor insists is what was meant by this Court when it declared in the Mormon Church *v.* U. S. (136 U. S., 44), that "doubtless Congress in legislating for the Territories would be subject to those fundamental limitations in favor of personal rights which are formulated in the Constitution and its Amendments." And again in McAllister *v.* U. S. (141 U. S., 188), when it was stated that there was no occasion to inquire "how far the exercise of that power is restrained by the essential principles upon which our system of government rests."

We respectfully submit that no Territory within the jurisdiction of the United States must be left to a protection "outside the limitations of the Constitution" and dependent upon what the Government may conceive to be its "spirit."

Where power is given and restraints are provided in one and the same instrument, the power cannot be freed from the restraints unless expressly so stated.

The burden is upon him who seeks to be freed from these restraints.

Grants of power will never be enlarged by implication, especially when they are accompanied by limitations. The grantor of the power, the principal, in this

case, the People of the United States, is always free to enlarge the power whenever the limitations he has imposed tend to frustrate *his* purpose in granting it, but the agent cannot protect himself against the abuse of power under any implied extension of it or under any implied exclusion from a clear limitation.

This we submit is the position of the Government in the present cases. They are seeking relief from a limitation; they are seeking to justify the exercise of a power withheld by that limitation.

The burden is upon them to demonstrate beyond cavil that they are free from the restriction.

Especially is this so when the removal of that restriction is so far-reaching in its consequences.

We respectfully submit that the exaction of duty upon the property of the plaintiff in error has not been justified, and that the judgment of the Court below should be reversed.

Dated New York, January 10th, 1901.

PAUL FULLER,

Of Counsel for the Plaintiff in Error.